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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

12 DEBBIE ANN LOWE,) 1:05-CV-0098 REC LJO HC
13 Petitioner,)
14 v.) FINDINGS AND RECOMMENDATION
15) REGARDING RESPONDENT'S MOTION
16 GLORIA HENRY, Warden,) TO DISMISS
17 Respondent.) [Doc. #16]

19 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus
20 pursuant to 28 U.S.C. § 2254.

BACKGROUND¹

Petitioner is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Fresno, imposed on March 12, 1999. Petitioner was convicted of murder in the second degree in violation of Cal. Penal Code § 187 and sentenced to two concurrent terms of fifteen years to life plus two consecutive one-year sentences for enhancements. See Lodged Document No. 1.

¹This information is derived from the petition for writ of habeas corpus and Respondent's motion to dismiss the petition.

1 Petitioner appealed the conviction to the California Court of Appeals, Fifth Appellate District
2 (hereinafter “5th DCA”). On March 29, 2001, the 5th DCA affirmed the judgment in an unpublished
3 opinion. See Lodged Document No. 2.

4 On May 4, 2001, Petitioner filed a petition for review with the California Supreme Court. See
5 Lodged Document No. 3. On June 27, 2001, the California Supreme Court denied the petition. See
6 Lodged Document No. 4.

7 On July 23, 2001, Petitioner filed a petition for writ of habeas corpus in this Court. See Lowe
8 v. Henry, Case No. 1:01-CV-5950-LJO-HC. On June 30, 2003, the petition was denied on the
9 merits.

10 On January 24, 2005, Petitioner filed her second petition for writ of habeas corpus in this
11 Court. On September 15, 2005, Respondent filed a motion to dismiss the petition as successive and
12 filed outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d)(1).

13 Petitioner did not file an opposition to Respondent’s motion to dismiss.

14 **DISCUSSION**

15 A. Procedural Grounds for Motion to Dismiss

16 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
17 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not
18 entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases.

19 The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer if
20 the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the
21 state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule
22 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874
23 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for
24 state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same).
25 Thus, a respondent can file a motion to dismiss after the court orders a response, and the Court
26 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

27 In this case, Respondent’s motion to dismiss is based on a violation of 28 U.S.C. § 2244(b)’s
28 proscription against successive petitions and 28 U.S.C. 2244(d)(1)’s one-year limitations period.

1 Because Respondent's motion to dismiss is similar in procedural standing to a motion to dismiss for
2 failure to exhaust state remedies or for state procedural default and Respondent has not yet filed a
3 formal answer, the Court will review Respondent's motion to dismiss pursuant to its authority under
4 Rule 4.

5 B. Successive Petition

6 A federal court must dismiss a second or successive petition that raises the same grounds as a
7 prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive petition
8 raising a new ground unless the petitioner can show that 1) the claim rests on a new, retroactive,
9 constitutional right or 2) the factual basis of the claim was not previously discoverable through due
10 diligence, and these new facts establish by clear and convincing evidence that but for the
11 constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying
12 offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court that decides whether a
13 second or successive petition meets these requirements, which allow a petitioner to file a second or
14 successive petition.

15 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this
16 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an
17 order authorizing the district court to consider the application." In other words, Petitioner must
18 obtain leave from the Ninth Circuit before she can file a second or successive petition in district
19 court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or
20 successive petition unless the Court of Appeals has given Petitioner leave to file the petition because
21 a district court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United
22 States, 129 F.3d 54, 57 (1st Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997),
23 *cert. denied*, 117 S.Ct. 794 (1997); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

24 Because the current petition was filed after April 24, 1996, the provisions of the
25 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current
26 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that she has
27 obtained prior leave from the Ninth Circuit to file her successive petition attacking the conviction.
28 That being so, this Court has no jurisdiction to consider Petitioner's renewed application for relief

1 from that conviction under Section 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at
2 1277; Nunez, 96 F.3d at 991. If Petitioner desires to proceed in bringing this petition for writ of
3 habeas corpus, she must file for leave to do so with the Ninth Circuit. See 28 U.S.C. § 2244 (b)(3).

4 C. Limitation Period for Filing a Petition for Writ of Habeas Corpus

5 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
6 1996 (hereinafter “AEDPA”). The AEDPA imposes various requirements on all petitions for writ of
7 habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059,
8 2063 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct.
9 586 (1997).

10 In this case, the petition was filed on January 24, 2005, and therefore, it is subject to the
11 provisions of the AEDPA. The AEDPA imposes a one-year period of limitation on petitioners
12 seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended,
13 § 2244, subdivision (d) reads:

14 (1) A 1-year period of limitation shall apply to an application for a writ of habeas
15 corpus by a person in custody pursuant to the judgment of a State court. The
limitation period shall run from the latest of –

16 (A) the date on which the judgment became final by the conclusion of direct
17 review or the expiration of the time for seeking such review;

18 (B) the date on which the impediment to filing an application created by
19 State action in violation of the Constitution or laws of the United States is removed, if
the applicant was prevented from filing by such State action;

20 (C) the date on which the constitutional right asserted was initially recognized by
21 the Supreme Court, if the right has been newly recognized by the Supreme Court and made
retroactively applicable to cases on collateral review; or

22 (D) the date on which the factual predicate of the claim or claims presented
could have been discovered through the exercise of due diligence.

23 (2) The time during which a properly filed application for State post-conviction or
24 other collateral review with respect to the pertinent judgment or claim is pending shall
not be counted toward any period of limitation under this subsection.

25 28 U.S.C. § 2244(d).

26 In most cases, the limitations period begins running on the date that the petitioner’s direct
27 review became final. In this case, the petition for review was denied by the California Supreme
28 Court on June 27, 2001. Thus, direct review would conclude on September 25, 2001, when the

1 ninety (90) day period for seeking review in the United States Supreme Court expired. Barefoot v.
2 Estelle, 463 U.S. 880, 887 (1983); Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir.1999); Smith v.
3 Bowersox, 159 F.3d 345, 347 (8th Cir.1998). Petitioner had one year until September 25, 2002,
4 absent applicable tolling, in which to file her federal petition for writ of habeas corpus. However,
5 Petitioner delayed filing the instant petition until January 24, 2005, over two years beyond the due
6 date. Absent any applicable tolling, the instant petition is barred by the statute of limitations.

7 D. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

8 Title 28 U.S.C. § 2244(d)(2) states that the “time during which a properly filed application
9 for State post-conviction or other collateral review with respect to the pertinent judgment or claim is
10 pending shall not be counted toward” the one year limitation period. 28 U.S.C. § 2244(d)(2). In
11 Carey v. Saffold, the Supreme Court recently held the statute of limitations is tolled where a
12 petitioner is properly pursuing post-conviction relief, and the period is tolled during the intervals
13 between one state court's disposition of a habeas petition and the filing of a habeas petition at the
14 next level of the state court system. 122 S.Ct. 2134, 2135-36 (2002); see also Nino v. Galaza, 183
15 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1846 (2000).

16 As stated above, the statute of limitations began to run on September 25, 2001, and expired
17 on September 25, 2002. Petitioner did not file any post-conviction collateral challenges with respect
18 to the pertinent judgment or claim in state court. Petitioner did file a prior petition for writ of habeas
19 corpus in federal court; however, that petition had no tolling consequences. Duncan v. Walker, 533
20 U.S. 167 (2001). Therefore, Petitioner is not entitled to any statutory tolling, and the petition remains
21 untimely.

22 E. Equitable Tolling

23 The limitations period is subject to equitable tolling if “extraordinary circumstances beyond a
24 prisoner’s control” have made it impossible for the petition to be filed on time. Calderon v. U.S.
25 Dist. Ct. (Kelly), 163 F.3d 530, 541 (9th Cir. 1998), *citing Alvarez-Machain v. United States*, 107
26 F.3d 696, 701 (9th Cir. 1996), *cert denied*, 522 U.S. 814 (1997); (Beeler), 128 F.3d at 1288 (noting
27 that “[e]quitable tolling will not be available in most cases, as extensions of time will only be granted
28 if ‘extraordinary circumstances’ beyond a prisoner’s control make it impossible to file a petition on

1 time"). "When external forces, rather than a petitioner's lack of diligence, account for the failure to
2 file a timely claim, equitable tolling of the statute of limitations may be appropriate." Id.; Miles v.
3 Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). Petitioner bears the burden of alleging facts that would
4 give rise to tolling. Smith v. Duncan, 297 F.3d 809 (9th Cir.2002); Hinton v. Pac. Enters., 5 F.3d
5 391, 395 (9th Cir.1993).

6 Petitioner does not argue that she was prevented in any way from timely filing the federal
7 petition. Accordingly, Petitioner is not entitled to equitable tolling and the petition remains
8 untimely.

9 **RECOMMENDATION**

10 Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss be
11 GRANTED and the habeas corpus petition be DISMISSED with prejudice for Petitioner's failure to
12 comply with 28 U.S.C. § 2244(d)'s one year limitation period and 28 U.S.C. § 2244(b)'s
13 proscription against successive petitions.

14 This Findings and Recommendation is submitted to the Honorable Robert E. Coyle, United
15 States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule
16 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of
17 California.

18 Within thirty (30) days after being served with a copy, any party may file written objections
19 with the court and serve a copy on all parties. Such a document should be captioned "Objections to
20 Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and
21 filed within ten (10) court days (plus three days if served by mail) after service of the objections.
22 The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The
23 parties are advised that failure to file objections within the specified time may waive the right to
24 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

25 IT IS SO ORDERED.

26 **Dated:** November 16, 2005
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/s/ Lawrence J. O'Neill
UNITED STATES MAGISTRATE JUDGE